point" within the network; and, 2) network elements must be provided on an unbundled basis at any technically feasible point.[96] The Notice seeks comment on the extent to which the Commission should become involved in setting nationwide standards in these two areas; and, if so, what principles should guide standard setting.[97]

Because of the Act's focus on negotiated interconnection, extensive Commission involvement in setting technical standards for interconnection should be avoided at this stage of implementation. Such involvement would be misplaced and premature. Instead, the Commission should establish only minimum interconnection standards.

The Act accords a significant role to individual negotiations between the various parties in determining interconnection arrangements. Negotiations should determine the scope and price of the interconnection and network element unbundling. The Commission should not undercut this role by adopting detailed standards for the states to follow.[98] To the extent that minimum federal standards are adopted, the following principles and guidelines should be adhered to.

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[96] See Notice ¶¶ 49-59, 74-116; 1996 Act, 110 Stat. at 62-63 (§ 251(c)).

[97] Notice ¶¶ 50, 51, 79-80, 89, 109, 111, 115, 128.

[98] If state actions concerning interconnection prove to be anti-competitive, the Commission can take appropriate steps at that time.

A. Network Elements And Interconnection Points Exist Only In The Local Exchange Network Under The Statute Notice Section II.B.2.

A troubling aspect of initial requests for network elements and interconnection points is a recurring demand that unbundling take place outside the local exchange network.[99] U S WEST disagrees with this view.

The network access provisions of the statute apply only to local exchange facilities.[100] Conversely, the interconnection rules applicable to all carriers under Section 251(a) apply to other carrier services offered by an incumbent LEC. Network elements are much more universal, however, and the statute could be read, literally, to apply to any telecommunications service offered anywhere by an entity which also provides local exchange service, whether or not the service constitutes the provision of local exchange service.[101] Such a reading of the Act would require that non-exchange services and facilities be made available as network elements. Clearly, such an interpretation cannot be reconciled with the language in Section 251(c)(2) and would be both pernicious and contrary to rational statutory interpretation.

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[99] For example, some carriers have demanded that high-capacity private lines be included in the category of network elements. The Notice seems to endorse the position that private line services are included in the network element class. Notice ¶¶ 84, 150, 152.

[100] By its terms, the Act applies to a "local exchange carrier's network." 1996 Act, 110 Stat. at 62 (§ 251(c)(2)).

[101] See id. at 62-63, 59-60 (§§ 251(c)(3), 3(a)(45)).

The Commission's ability and statutory duty to distinguish among various carrier activities for regulatory purposes is well established.[102] Application of network element unbundling rules to any non-local exchange service is clearly not necessary. Nor was it contemplated by Congress. Moreover, an incumbent LEC could avoid the application of rules simply by using a different corporation to offer non-local exchange services, or by declining to offer the services at all. This would be contrary to the intent of the Act, which is focused on the enhancement of local exchange competition.

Applying the network element unbundling rules to any service of an incumbent LEC where a similar service is available from others or could be economically duplicated would be potentially anti-competitive.[103] Even though LEC network elements must be priced at a level to ensure that a reasonable profit is earned, it makes no sense for the federal (or a state) government to intrude into the workings of a competitive marketplace to direct any aspect of negotiations for a service where reasonable alternatives exist.

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[102] See Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1474-76 (D.C. Cir. 1984).

[103] For example, operator services are highly competitive services which are provided by hundreds of companies. In U S WEST's territory alone, there were more than 400 companies providing such services in 1995. Neither facilities-based providers of local service nor resellers face any barriers in obtaining operator services. Such services, therefore, cannot be classified as a necessary network element. These services are widely available and are not necessary for the transmission and routing of telephone calls. It would be a disservice to both the competitive operator services industry and incumbent LECs if the Commission found operator services to be an necessary network element.

For example, it would clearly be anti-competitive for the Commission to require an incumbent LEC to construct a DS1 for AT&T, tying up the resources and capital of the LEC in order to free AT&T's own resources. Indeed, such an application of the network element unbundling rules could have an adverse impact on existing competition in special access markets. In short, if a particular network facility is economically available from multiple sources in a particular market, there is no need to regulate negotiations for that facility or service, at all.[104]

The Commission's rules should recognize that the 1996 Act's unbundling rules apply only to existing local exchange services and facilities offered in specific markets; and only to those services and facilities that are economically "necessary" to the local exchange operations of the requesting interconnector.[105] Negotiations or arbitration should be allowed to follow that general pathway.

B. Specific Unbundled Access Points And Network Elements Notice Section II.B.2.

In summary, U S WEST proposes the following minimum set of interconnection points and network elements:

> Loops -- Customer loops should be unbundled at the distribution frame and extend from that point to the network interface device at the customer's premises

[104] Needless to say, the fact that a particular service or facility is available in various large markets served by a BOC or other large incumbent LEC would not necessarily mean that the same facility or service was available in some smaller communities (although it might be economically available from AT&T, for example, even if AT&T did not desire to offer the facility).

[105] See 1996 Act, 110 Stat. at 62-63 (§ 251(c)(3)).

Local Switching -- Local switching should be unbundled and accessed at either a line or trunk side port.

Local Transport--Local transport should be unbundled in accordance with the Commission's local transport restructure (i.e., direct trunk transport, entrance facilities, and tandem-switched transport).

Databases and Signalling --Unbundled access should be allowed to the 800 Database and the Line Information Database ("LIDB"), but not to other proprietary databases. Interconnection to signalling systems should be allowed at the Signalling Transfer Point ("STP"). Interconnectors should be permitted to provide their own transport to the STP or purchase transport (i.e., A and D links) from LECs.

This set of interconnection points and network elements both satisfies the requirements of the Act, including the Section 271 checklist, and is technically feasible for incumbent LECs to provision. Any additional unbundling should be determined by individual carrier negotiations rather than regulatory fiat..

C. Technical Feasibility Is Not The Same As Technical Possibility Notice Section II.B.2.

In considering technical feasibility, it is important to distinguish between when it is "technically possible" to unbundle a particular network element on an individual basis as opposed to when it is "technically feasible" to do so, within the context of operating a telecommunications network.[106] In today's telephony environment, there is practically nothing which is not "technically possible" at some

[106] Technically feasible is a more complex concept than technically possible. The former includes the economic, reliability, operational, network integrity and end-user impacts of particular unbundling situations, and how these impacts would affect the price of the unbundled network elements (and whether the costs would be so great as to make the offering of the unbundled network element uneconomic).

cost -- cost being measured in dollars, operational efficiency, network reliability, security or similar assessments.[107] Technical feasibility, in the context of unbundling, incorporates two ideas: 1) the technical possibility of creating the unbundled element; and, 2) the cost of that unbundling. Included in the latter idea, of course, is how those costs will be recovered.

In general, unbundling the local loop is "technically possible" at almost every point, assuming cost and network reliability are of no concern. Unbundling the loop at the central office is the most efficient way to achieve loop unbundling. The interconnection point between a loop and the switch or port is a natural one. Thus, the costs of such unbundling, while not inconsequential,[108] are certainly manageable. It is technically feasible to unbundle virtually all types of loops at the central office including copper loops and those delivered *via* universal and integrated DLC (at DS0, DS1 and four-wire interconnections). While the technology of loop unbundling at the central office is complex (because many loops are not carried over a dedicated copper pair), it is technically feasible, and U S WEST is committed to providing such unbundled loops.

The differences between the concepts technical feasibility and technical possibility can be illustrated in the context of sub-loop unbundling. Sub-loop

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[107] A directly related issue is the fact that this cost must be lawfully assessable on the cost causing entity, and cannot be imputed into the price of another product -- even a product which could be viewed as including the unbundled piece part.

[108] Some unbundling scenarios would require the development of new types of loop equipment, such as the addition of digital cross-connect systems for digital loop carrier ("DLC") systems.

unbundling is neither technically nor operationally feasible, at least not within the context of today's network architectures.[109]

Sub-loop unbundling does not occur at natural interconnection points. As a result, existing provisioning, testing, tracking, maintenance, and billing systems would need to be modified significantly -- at substantial cost -- to accommodate any

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[109] When state Commissions within the U S WEST region have evaluated whether to require sub-loop unbundling, they have generally concluded that it is not practical, and should not be required. For example, in the Docket UM 351 unbundling proceeding in Oregon, completed in late 1995 (Order still pending), the sub-loop unbundling issue was debated at length. Initially, the Oregon Commission Staff argued in the UM 351 workshops, for the unbundling of the loop into feeder and distribution. However, after two years of intense study and debate, the final staff unbundling proposal did not include the unbundling of the loop into feeder and distribution. (See testimony of Jonathan Wolf before the Oregon Public Utility Commission, Docket UM 351, filed Aug. 14, 1995.)

In its recent decision, the Washington Commission found no need for unbundling beyond the unbundled loop at this time:

> However, it appears that the Commission need not order unbundling at this time, given U S WEST's representation that it will file an unbundled loop tariff, and the apparent lack of an immediate need for more extensive unbundling. At this time, the Commission is satisfied with a first level of unbundling that includes an unbundled loop and an efficient [connection to the new entrant's collocated equipment]. (Fourth Supplemental Order, Docket No. UT-941464, Washington Utilities and Transportation Commission, Oct. 31, 1995, at 52.)

The unbundling of feeder and distribution has also been rejected recently by the Colorado Commission. (See Decision No. C96-347, Docket 95R-556T, Colorado Public Utilities Commission, Mar. 29, 1996, at 46.) In the Colorado unbundling workshops, some parties, including AT&T and MCI, argued that the loop should be unbundled into feeder and distribution. The Commission declined to accept this position, and adopted unbundling rules that require only the unbundling of the entire local loop as a discrete entity.

Thus, state commissions that have evaluated sub-loop unbundling in detail have concluded that the unbundling of the loop into feeder and distribution should not be required. The Commission should give great weight to the conclusions of these state commissions in its consideration of loop unbundling requirements.

type of sub-loop unbundling. This is due in large part to the fact that loops were never designed to be segmented or controlled by numerous carriers.[110] In many cases, LECs would be required to substitute manual systems for existing automated systems for some period of time while new automated systems were being designed and developed to accommodate sub-loop unbundling.

Sub-loop unbundling presents significant problems even at interconnection points currently accessed by U S WEST employees in normal provisioning procedures. Even at such interconnection points, the costs and complexities of sub-loop unbundling would be extreme. Among other things:

- Remote testing would be impossible in the short-run and extremely expensive, if not uneconomic, in the long run.
- Multiple dispatches would be inevitable in the event of technical trouble.[111]
- Protection and demarcation jacks would be required for entities to avoid network harm to all providers.
- Manual provisioning would be the rule rather than the exception for even simple orders.[112]

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[110] Current outside plant facilities have been designed and engineered to minimize the amount of human interaction required to operate the network. Increasing intervention in the outside plant facilities will undermine these technology investments, thereby increasing costs attributable directly to unbundling.

[111] The provisioning and repair of unbundled sub-loops would always require a field dispatch (and might also require a central office dispatch, depending on the sub-loop pieces equipped). An outside dispatch for U S WEST takes an average of 151 minutes and costs approximately $88 to $120. The cost of inside dispatches varies because some offices are not attended, and the cost varies between $30 and $120 for an inside dispatch. (It should be noted that inside dispatches, when loops are bundled or unbundled at the loop element, almost always entail multiple work functions, thus splitting the cost among multiple loops. Such would not be the case if loops were unbundled at the sub-loop level.)

- The difficulty of forecasting and network sizing would increase exponentially.
- It would be all but impossible to maintain current service intervals with multiple providers.
- Tracking and recordkeeping would become a manual operation in the short-term and much more expensive over time.
- New security measures would have to be developed to accommodate sub-loop unbundling.
- It would be all but impossible to maintain current end-to-end performance levels.[113]

Sub-loop unbundling can be very expensive, even in relatively simple cases such as where traditional copper access loops are unbundled at the feeder distribution interface ("FDI"). U S WEST estimates that the cost of re-engineering and modifying cabinets at the FDI alone would cost approximately $50 per access line, at relatively modest levels of sub-loop unbundling.[114]

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[112] Today's POTS orders are currently provisioned electronically requiring no manual intervention for 80 to 85% of orders. Sub-loop unbundling, in contrast, would require manual intervention for 100% of orders -- with an incremental cost of provisioning in the range of $75 - $160 per order.

[113] End-to-end performance levels are achieved by assigning standard performance requirements to different parts of the circuit, including the loop. This places limits on loop length, gauge, the number of bridge tops, etc. Many sub-loop unbundling scenarios do not assign responsibility for overall performance of the loop to a single entity. As a result, numerous factors (such as poor splicing) could easily lead to a degradation in overall service quality.

[114] This estimate assumes that unbundling would occur at 10% of U S WEST's FDIs and that existing 1800 pair cabinets would have to be replaced in order to accommodate interconnectors. These costs do not include any ongoing operational costs or lost efficiencies associated with sub-loop unbundling or labor and provisioning expense.

In cases where access loops are provided using DLC technology, sub-loop unbundling becomes even more complex. In a DLC environment, loops are concentrated over a carrier system and individual loops are derived at a remote terminal. In order to unbundle the feeder (i.e., allow another carrier to provide transport from the central office to the remote terminal), DLC systems would have to be redesigned, including software upgrades, to allow for the introduction and termination of additional DS1 facilities from other carriers. Even then, unbundling would have to occur in relatively large increments (e.g., 96 channels) due to the design of different DLC systems. Under such a scenario, a carrier's control over its feeder would still be limited by the need for the incumbent LEC to maintain overall control and administration of the remote terminal.

U S WEST's analysis and the above discussion lead to two conclusions that cannot be ignored in this rulemaking. First, the total cost of providing unbundled sub-loops would greatly exceed the cost of providing the same number of loops in which the entire loop is unbundled. As such, the total price of unbundled sub-loop elements must exceed the price of a complete loop, much more so the price of end-user service offered by the incumbent LEC to its own customers. It is critical that any interconnector demanding a particular interconnection point or network element be prepared to pay the cost of providing whatever is demanded. Any Commission regulation in this area should mandate this result.

Second, the old adage that "the whole is the sum of the parts" does not apply within the context of unbundling, for a number of reasons. First, a provider does

not necessarily use the same parts when an unbundled service is provided versus a complete service.[115] Furthermore, even if the same parts are used, these components do not necessarily cost the same when provisioned on an unbundled basis versus a bundled basis because unbundling has its own unique costs. Moreover, efficiencies which are gained in providing a total service may often be lost in providing components of that service, further widening the cost gap between the finished service and the unbundled components.

It would be unreasonable to prohibit, *via* the vehicle of price imputation, the incumbent LEC from realizing the efficiencies which the total service offering can provide. A requirement that incumbent LECs "impute" the price of an unbundled element into the price of complete services (which by implication include the unbundled element) would be arbitrary and would be anti-competitive. It would also create disincentives with respect to LEC investment in network upgrades, by denying them the ability to recognize network efficiencies in the prices of their own services.

D. Switch Unbundling
Notice Section II.B.2.

U S WEST plans to offer unbundled line and trunk port switching functionality and expects that it will be able to negotiate satisfactory arrangements to provide unbundled switching to other carriers in the near future. Unbundling

[115] More often than not unbundling requires additional components and new interfaces.

line and trunk side switch ports gives interconnectors full access to switching services and switching features,[116] and is a reasonable response to the requirements of the 1996 Act.

However, U S WEST's proposed offering does not appear to be enough for some interconnectors who claim that switch unbundling must include access to the internal fabric of U S WEST's switches, i.e., including switching intelligence. Even if it were technically feasible (which is highly questionable), this type of unbundling raises numerous issues including "gatekeeping," network security, security of customer information, disaster recovery, operational efficiency, licensing of intellectual property,[117] maintenance, and overall network/switch administration.

The only way to effectively unbundle LEC switching to meet such demands would be to partition switches. The overall effect would be a dramatic reduction in the overall efficiency of the operations of any carrier which was forced to operate with a partitioned switch.[118]

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[116] Line-side ports provide basic dialtone functionality, while trunk-side ports allow access by end-user trunks (e.g., PBX trunks to the central office). Both types of ports allow interconnectors to purchase switching features.

[117] For example, at least one interconnector has requested that it be allowed to select features in generic switch software for its exclusive use.

[118] Switches currently in the U S WEST network were designed to operate as a whole, not to be administered and maintained by multiple entities. Switch designers designed their products so that single control of the switch fabric is the key to switching and network reliability. Segmentation and/or partitioning of the switch, an absolute necessity given security concerns, would be costly. Such segmentation would result in switches that would be much more expensive and inefficient to operate and repair than those currently in operation.

In a partitioned switch, "firewalls" would be required to keep the various carriers controlling parts of the switch from viewing each others' information. Capacity provisioning for the incumbent LEC also would become much more complex, due to the loss of control over the switch. Furthermore, without a single point of control over switch software, operation of the switch would be severely jeopardized. Software upgrades would become difficult, if not almost impossible, in partitioned switches.[119]

Furthermore, switch replacement would be exceedingly difficult, because a new switch might not (indeed, probably would not) support all of the features installed by the different switch controllers. In short, allowing multiple competing entities to deploy features autonomously on the same switch platform would be inefficient, counterproductive, and often impossible.[120]

Requiring LECs to unbundle switching in such a way that interconnectors would have direct access to the switch fabric, while perhaps technically possible, is not technically feasible. Mandating such unbundling would do little to further the Act's goal of encouraging local exchange competition. Rather, such a requirement

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[119] Having multiple generics in one switch and designating specific lines to that generic would likewise not be feasible. While some switch architectures may allow variations of software generic releases and corrective overwrites to be placed in specific parts of the switch, it would still not be feasible to allocate certain switch lines to a specific release.

[120] A simple analogy is the impossibility of having more than one operating system running in a single computer (e.g., Windows and Windows 95 cannot run simultaneously).

would prevent incumbent LECs from providing switch and network integrity, an outcome clearly contrary to the public interest.

E. Database Unbundling
Notice Section II.B.2.

The Act includes databases and signaling systems in its definition of network elements,[121] and the Notice seeks comment on how to apply network element unbundling rules to incumbent LEC data bases.[122] Several observations are important.

First, several IXCs have demanded that they be given access to U S WEST's OSS databases. Indeed, the implication of these demands is that any LEC computer database is fair game for access and unbundling. Thus, it may be important that the Commission specify that the only LEC databases and signaling systems affected by the Act are those related to the actual provision of local exchange service. There is no need to attempt to specify all LEC databases which fit within this definition, but it would be extremely helpful if the Commission specifies that the Act is not a declaration of open season on LEC proprietary systems and databases.

Second, the Notice seeks comment on the AIN unbundling docket, in particular on the ongoing Tier 1 LEC AIN testing plan exploring methods of third-

[121] See 1996 Act, 110 Stat. at 59-60 (§ 3(a)(45)).

[122] Notice ¶¶ 107, 109-115.

party access to LEC AINs.[123] This trial should be continued and supported, as a necessary step in determining the feasibility of access to specified AIN elements. This trial is proceeding, and, as of May 1, 1996, 37 respondents have indicated an interest in trial participation. An additional 62 respondents have requested inclusion on the project mailing list. This list of interested parties includes representation of all industry segments. The only major industry player which refuses to participate is AT&T.

One aspect of the trial which fits directly into the requirements of the 1996 Act and the Notice is the testing for technical feasibility of various types of AIN unbundling. The trial will allow the evolution of AIN standards necessary to support the emergence of AIN-based services, developed by a variety of industry players using non-proprietary interfaces. This investigation should assure that underlying network reliability, security, and customer privacy requirements essential to a proper evaluation of AIN unbundling are not casually addressed.[124]

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[123] Id. ¶ 113

[124] As an aside, the Notice suggests that a particular type of unbundling will be presumed to be technically feasible if another company has accomplished the unbundling with the same technology. Id. ¶ 87. In the AIN context, that unbundling which has been accomplished has been done using proprietary technology -- technology not deployed by U S WEST. For example, BellSouth's DESIGNEDGE product, which provides AIN function access, utilizes a proprietary database technology tailored specifically to its network. This technology is not ubiquitous across the LECs and is not used by U S WEST.

V. IMPACT ON ACCESS CHARGES
Notice Section II.G.

AT&T contends that its right to negotiate interconnection agreements supersedes existing U S WEST interstate and intrastate access tariffs.[125] AT&T asserts that is would receive an 85% discount from tariffed rates by this device. Of course, if CCL and RIC charges are moved immediately to flat-rate recovery, much of the alleged discrepancy between interconnection and tariffed access would disappear.

Section 251(c)(2) provides that interconnectors may request interconnection for the purpose of "transmission and routing of telephone exchange service and exchange access [service]." Section 251(c)(3), however, contains no such limitation. It appears to grant to any "telecommunications provider" the ability to purchase unbundled network elements.

The Notice tentatively concludes that all carriers can purchase either interconnection or network elements, that interexchange carriers cannot use Section 252(c)(2) interconnection for the purpose of originating or terminating interexchange traffic, and that such carriers can purchase both unbundled network elements and interconnection as "alternate local access providers." The Notice requests comment on these conclusions and a variety of permutations of these conclusions.[126] The Notice also tentatively concludes that a LEC cannot

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[125] See attachment to AT&T letter, supra n.40, at 1, 3-5, 29-32.

[126] Notice ¶¶ 160-165.

simultaneously charge for interconnection and interstate access over the same facility.[127] A closely related issue is whether the same analysis applies to resale rights[128] and mutual compensation rights, as they might be demanded by an IXC for use in the origination or termination of interexchange traffic.[129]

AT&T's claim that the 1996 Act immediately supersedes Part 69 of the Commission's rules, is palpably false. Nothing in the Act, nor in the Notice, repeals those regulations. In fact, under the Section 251 statutory scheme, this action would result in relegation of arbitration of rates for interstate services to state regulatory agencies.

However, this argument highlights a more real problem that the Commission must address immediately. Because the Commission's goal is a competitive marketplace, it should not create pricing anomalies between interconnection pricing and costing and the pricing and costing of access charges. In a competitive

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[127] Id. ¶ 165.

[128] To the extent that access charges subsidize exchange (primarily residential) rates, it is clear that permitting resold exchange services to substitute for access would create a pricing death spiral.

[129] The Notice posits the possibility that an IXC might form an affiliate to obtain interconnection for the purpose of offering a competing exchange access service (id. ¶ 162). This statement is essentially a *non-sequitur*. Call termination refers to termination of a call to a customer to whom the terminating carrier provides dialtone. A competing exchange access provider providing terminating services to its own end-user customers (to whom it provides dialtone) would not rely on LEC call terminating services. Likewise, an IXC subsidiary which purchases call termination from a LEC under the guise of configuring a "competing exchange access" business, renames the purchased call termination "terminating access," and sells the service to itself as competing exchange access service, would merely be perpetuating a ruse.

marketplace, incumbent LECs should not be compelled to sell the same or interchangeable services at different prices to the same customers or to police the price differentials through usage restrictions.

In the long term, interstate access and Section 251 interconnection must be totally harmonized, if not merged. In the short run, however, regardless of how the ultimate issue of interexchange carrier Section 251 rights is determined, the Commission should make clear that the existing access charge regime remains in full force and effect until the Commission has explicitly replaced that regime by new rules.[130]

Two actions are required in light of the potential symmetry between Section 251 interconnection and interstate access tariffs. First, Section 251 pricing must be harmonized with interstate access pricing, both long and short term. If Section 251 pricing is materially less expensive than access pricing, IXCs will have an uneconomic incentive to avoid purchasing interstate access from incumbent LECs.

A simple way for an IXC to avoid the purchase of access would be for the IXC to interconnect through an alternate local exchange provider,[131] assuming that the Commission's rules permitted such an arrangement. Alternatively, an IXC could become a LEC, claim the end-user customer as its own, on the promise of lower long distance charges attributable to lower access rates, and connect long distance

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[130] See 1996 Act, 110 Stat. at 65 (§ 251(g)).

[131] There is no reason to permit a discrimination in the price for origination or termination of interstate traffic based on whether an intermediary provider exists between the IXC and the LEC.

services in that manner. While this might represent a more complex corporate architecture and market strategy, it could be more economically destructive.

For now, the Commission should require all interstate traffic subject to the Part 69 rules, but only for a short time.[132] However, even considering the effect of Section 251(g) and the fact that the large IXCs are temporarily prohibited from joint marketing telephone exchange service and interLATA service, the Commission should not create a Section 251 pricing structure that is not harmonious with interstate access rates. Similarly, the Commission should ensure that states do not enact such a structure either.

A related issue involves the price interrelationship between access and interconnection. Potential interconnectors persist in the notion that any price which is based on any of the interconnection pricing rules should be lower than the tariffed price for interstate access. That is, there is an assumption that the interstate access rates are not cost based.[133] Both the position and the assumption should be rejected.

The assumption, as a matter of law as well as economic reality, is fundamentally false. Interstate access rates are based entirely on the cost of providing interstate access, to the extent that costs have been appropriately assigned to the interstate jurisdiction. The rates are cost-based, even though, as

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[132] U S WEST assumes that a carrier which does not wish to pay access charges for interstate traffic delivered *via* an interconnection arrangement would simply order a separate tariffed access arrangement

[133] See, e.g., ALTS Handbook at 13-16.

noted below, the cost recovery mechanisms in Part 69 were not created to account for a competitive market.

The potential symmetry between Section 251 interconnection and Part 69 access provides a clear indication that interconnection prices must be such, even initially, that there is no significant economic incentive to attempt to bypass interstate access tariffs by purchasing the same services and facilities as offered in interstate access tariffs, under the nomenclature of interconnection.

Because of the overlap between interconnection and access charges, access charge reform is critical. The Commission identifies the importance of access charge reform,[134] but fails to establish specific timelines or schedules for taking action.

It is obvious, considering nothing other than AT&T's advocacy that interstate access charges are overpriced by a factor of six, that the access charge structure must be modified immediately. Access charge reform must have at least three components:

- Immediate Action. The Commission must change the CCL and the RIC from a usage-sensitive rate to a flat rate. By moving the CCL and RIC to a flat rate, the remaining per-minute rate will be considerably closer to what U S WEST expects will be negotiated under Section 251. Incumbent LECs must also be given the immediate ability to negotiate and file contract tariffs for interstate access.[135]

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[134] Notice ¶¶ 146, 164-65.

[135] See generally In the Matter of AT&T Communications Revisions to Tariff FCC No. 12, Memorandum Opinion and Order on Remand, 6 FCC Rcd. 7039 (1991), wherein the Commission discusses and analyzes contract tariffs within an integrated service package context.

- Transition. In transitional rulemakings, the Commission should address the ESP exemption from carriers' carrier charges (and the concomitant problem of "one way carriers" in a reciprocal compensation regime), the carrier status of ESPs and Internet Service Providers, the RIC and other local transport related issues, and the ultimate disposition of the CCL charge. These issues merit a transitional approach because they require more time to resolve. The Commission should ensure that its transitional rules do not become permanent. Recent experience with the ESP exemption demonstrates how even a well-intentioned transitional mechanism can be transformed into a permanent arrangement.

- A permanent harmonization of access charges and Section 251 interconnection. It is not clear whether interstate access will ultimately be replaced by Section 251 negotiated contracts. This issue should be studied in depth in the access charge restructure docket. What is clear, however, is that disparate pricing, costing or other standards which would create economic incentives for carriers to choose between the two for regulatory reasons would be arbitrary and destructive.

VI. RESALE
Notice Section II.B.3.

Several resale issues deserve comment.

First, any economically rational analysis of resale in the local exchange market must acknowledge that resale in that market has several characteristics not shared with resale in the long-distance market. There never has been a possibility that long distance carriers would be required to offer below-cost services to resellers. Indeed, the possibility of below-cost service being ordered by the government for resale appears to be quite unique in the history of all industries, not just telecommunications.

Moreover, in the long-distance market, smaller IXCs were utilizing resale as a vehicle for market entry, as opposed to today where the world's largest long-distance telecommunications corporation is positioning itself to be the world's largest local exchange reseller.[136] Due to the giant size of AT&T, below-cost resale prices could be used by AT&T to effectuate a massive market shift almost overnight. The possibility that below-cost resale prices, established either by the Commission or by the States, could enable AT&T to totally dominate the telecommunications market should not be ignored.

Second, resale of network elements is inextricably bound with wholesale pricing. The marketplace is composed of retail purchasers, who use telecommunications services for their own use, and wholesale purchasers, who use telecommunications services in their own production process.[137] There is no indication that the 1996 Act or the Notice envisions a set of "resale" customers who must resell products in order to gain access to wholesale prices. What is clearly intended is that LECs will establish wholesale prices that can be utilized by entities that resell the services of others.[138]

Third, from an economic standpoint, and according to the 1996 Act, a customer is entitled to a wholesale price because term and/or volume commitments

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[136] It is worth remembering that AT&T, when its own services were on the line, vigorously sought to limit resale.

[137] AT&T itself has failed to recognize this distinction and has often been cited for violating the Communications Act by attempting to prevent resellers from having access to AT&T's wholesale rates.

[138] Such wholesale prices will be available only to wholesale purchasers.

by that customer permit the selling entity to save retail marketing costs.[139] Thus, a wholesale rate, which can be individually negotiated, will depend largely on the normal economic commitments the purchaser is willing to make and the supplier is willing to accept. If a purchaser is unwilling to make wholesale commitments, it should not be entitled to wholesale prices. In other words, one cannot obtain a retail service at a wholesale price. To the extent that the 1996 Act forces LECs to become wholesale suppliers, they must be permitted to conduct their wholesale businesses on an economically sound basis.

Fourth, to the extent that the Commission regulates wholesale prices, it should not consider promotions and discounts of retail services in setting those prices, because the promotions and discounts are akin to marketing costs. They have nothing to do with retail or wholesale prices *per se*.

Fifth, the Commission requests comment on "what types of restrictions on resale of telecommunications services would be 'unreasonable'"[140] The Commission believes that "few, if any, conditions or limitations should be permitted because such restrictions generally are inconsistent with the pro-competitive thrust of the Act."[141]

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[139] Harris and Yao Affidavit at 23-25.

[140] Notice ¶ 197.

[141] Id. ¶ 197.

The Harris and Yao Affidavit addresses the issue of restrictions on resale of services.[142] In competitive wholesale markets, wholesale suppliers negotiate term and volume discounts related to the commitments offered by the purchaser. The conditions of sale are mutually convenient and cost effective. It would be utterly arbitrary to force LECs to depart from normal wholesale marketing principles in offering wholesale service to resellers.

In telecommunications, the "wholesale packaging analogy" would require that AT&T and other "wholesale" resellers purchase local exchange facilities in a way that is convenient for U S WEST, not convenient just for the marketing strategies of the resellers. For example, if resellers want a substantial wholesale discount on local loops, they might be required to purchase a large number of loops from the same end office, not pick and choose individual loops for geographically dispersed customers who happen to make a high volume of long-distance phone calls, or use a high volume of enhanced local exchange services.

Sixth, the Commission cannot force U S WEST to offer a wholesale discount on services already priced below the economic cost of the service. The notion of a wholesale discount price for a retail service which is already priced below cost due to regulatory mandates is economically irrational. It is sort of a real-life example of "lose a dollar on every sale and make it up in volume."

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[142] See, e.g., Public Service Enterprises of Pennsylvania, Inc. v. AT&T Corp., Memorandum Opinion and Order, 10 FCC Rcd. 8390, 8398-99 ¶ 19 and n.36 (1995).

U S WEST's position on this issue is quite simple: If a state proves intransigent in pricing retail services below cost, the Commission must under Section 253 of the Act, as part of requiring the establishment of a wholesale price for that service, preempt the state's below-cost pricing scheme. State action which results in below-cost pricing for resold services is anti-competitive and confiscatory.

Seventh, the Act's wholesale pricing of LEC services applies only to finished services actually offered to end users. A service which is not offered at retail is not subject to the wholesale provisions of the 1996 Act.

Eighth, because wholesale prices are based upon existing retail prices, not on costs, it is possible that pricing anomalies between resold services and other facilities/services addressed in this docket will come into existence. As discussed above, pricing anomalies are uneconomic and inconsistent with a competitive market goal. Accordingly, the Commission must ensure that it does not create such anomalies. In addition, rate rebalancing to eliminate and reduce existing anomalies is required.

Ninth, some services are already offered on a wholesale basis that includes volume discounts pursuant to tariff; private line services, for example. These wholesale prices generally reflect the proper discount. No further discount, e.g., based on the same volumes and terms, is appropriate for resellers in this circumstance.

Tenth, any wholesale pricing discount must be based on costs actually avoided. An interconnector demanding a "wholesale" price for services, while also